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No. 07-361

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SUPREME COURT, U.S.

In The

# Supreme Court of the United States

JAMES EDWARD WILLIAMS,

*Petitioner,*

v.

BRENT R. WATSON, NORMAN D. MCKELLAR, SUZANNE NICOLE PRICE, BUNSTINE, WATSON & MCELROY, NICK D. BUNSTINE, LOUIS ANDREW MCELROY, II; JOHN K. HARBER, PRYOR, FLYNN, PRIEST & HARBER, ROBERT E. PRYOR, SR., FRANK L. FLYNN, JR., and TIMOTHY A. PRIEST,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Tennessee**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether this Court should review a decision of the Tennessee Court of Appeals affirming the summary judgment granted by the trial court, where this Court has no jurisdiction because the appellate decision was based on state law, and the appellate decision neither decided an important question of federal law that has not been, but should be, settled by the Supreme Court nor did the decision decide an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

2. Whether this Court should review the decision of the Tennessee Court of Appeals declining to reverse the judgment as a matter of law that was entered by the trial court where the Petitioner admits that he did not comply with applicable Tennessee Rules of Civil Procedure and where allegedly responsive evidence was not properly placed in the record. While Petitioner characterizes this appeal as involving a violation of his due process rights, Respondents submit that the real issue is Petitioner's refusal to accept the consequences of his failure to comply with the rules of procedure applicable to the lawsuit, and this does not merit United States Supreme Court review on certiorari.

## PARTIES TO THE PROCEEDINGS

The following persons or entities participated in the proceedings in the Tennessee Court of Appeals for the Eastern District of Tennessee:

1) James Edward Williams,
Plaintiff in the Tennessee Circuit Court
Appellant in the Tennessee Court of Appeals
Petitioner in the Tennessee Supreme Court and
Petitioner in the United States Supreme Court

2) Brent R. Watson, Norman D. McKellar, Suzanne Nicole Price, Bunstine, Watson & McElroy, Nick D. Bunstine and Louis Andrew McElroy, II
Defendants in the Tennessee Circuit Court
Appellees in the Tennessee Court of Appeals
Respondents in the Tennessee Supreme Court and
Respondents in the United States Supreme Court

3) John K. Harber, Pryor, Flynn, Priest & Harber, Robert E. Pryor, Sr., Frank L. Flynn, Jr. and Timothy A. Priest
Defendants in the Tennessee Circuit Court
Appellees in the Tennessee Court of Appeals
Respondents in the Tennessee Supreme Court
Not parties to Petition filed in the United States Supreme Court [Petition p. 2, fn 2]

## STATEMENT REGARDING PARENTS/SUBSIDIARY STATUS

Pursuant to Supreme Court Rules 24.1(b) and 29.6, each of the Respondents is an individual attorney at law or their associated law firms. None of the Respondents are corporate entities for which disclosure of parent/subsidiary status would apply.

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## JURISDICTION

This Honorable Court does not have jurisdiction to hear Petitioner's request for certiorari to the Tennessee Court of Appeals inasmuch as this Court does not have the power to review issues of state law arising from state courts. Since the decision below rests on independent state grounds, the decision is not subject to this Court's jurisdiction and any opinion or directive from this Court would be advisory in nature, since it would be rendered on federal grounds. In connection with state court rulings on state law issues, Justice Brennan has stated that this type of state law judgments "not only cannot be overturned by, [but] indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases."[1]

This Court lacking jurisdiction over this particularly state law claim, Petitioner's request for a writ of certiorari should be denied.

## STATEMENT OF THE FACTS

### Procedural Facts

The procedural facts relevant to Petitioner's Petition for Writ of Certiorari are straightforward. Petitioner filed his complaint against Respondents

[1] Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

McKellar[2] in the Tennessee Circuit Court asserting damages as a result of actions taken by Respondents' in their representation of Petitioner's ex-wife in a hotly contested divorce proceeding. [Petition App. 7-9.][3] Respondents filed a motion to dismiss Plaintiff's complaint under Tennessee Rules of Civil Procedure 12.02(6) and/or for summary judgment pursuant to Tennessee Rules of Civil Procedure 56. Because affidavits of Respondent/Defendant Norman D. McKellar and of Respondent/Defendant Suzanne Nicole Price were attached to the motion for dismissal, it was transformed, pursuant to Tennessee Rules of Civil Procedure 12.02, into a motion for summary judgment and the motion is then determined by the mandate established in Tennessee Rules of Civil Procedure 56. [Petition App. 9-10.] Respondents McKellar also filed a statement of undisputed material facts in support of the requested summary judgment specifically identifying by number the various facts asserted to be undisputed in the case, as required by Tennessee Rules of Civil Procedure 56. [Petition App. 10, 12-18.]

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[2] The Respondents in this Court are Brent R. Watson, Norman D. McKellar, Suzanne Nicole Price, Bunstine, Watson & McElroy, Nick D. Bunstine and Louis Andrew McElroy, II. They will be referred to in this Opposition as Respondents McKellar.

[3] Respondents will reference the various lower court decisions that have already been provided to this Honorable Court in the Appendix to Petitioner's application by noting the document name and Appendix page number where the document or quotation can be found. [Petition App. ___.]

Petitioner filed a document responding to the motion and the statement of undisputed facts, together with a brief supporting the Petitioner's argument. Attached to this response was an affidavit of Petitioner James Edward Williams that essentially repeated the complaint allegations together with an affidavit of Barbara Cochran, the day care administrator to whom the allegedly objectionable statements were made. [Petition App. 10-12, 18-19.]

On September 14, 2005, Tennessee Circuit Court Judge Harold Wimberly entered orders of dismissal as to all claims against all the Respondents, expressly finding that there was no basis for the Petitioner's claims against any of the Respondents. [Petition App. 25-28.]

These orders dismissing Petitioner's case were the subject of Petitioner's appeal to the Tennessee Court of Appeals. The Court of Appeals reviewed the record before it and determined that the Plaintiff had not properly responded to the motion for summary judgment. [Petition App. 23.] Specifically, the appellate court found that Petitioner failed to comply with the mandate found in Tennessee Rules of Civil Procedure 56 requiring a response to the undisputed statement of material facts. [Petition App. 19-23.]

After losing in the Tennessee Court of Appeals, Petitioner filed an application for permission to appeal to the Tennessee Supreme Court pursuant to Tennessee Rules of Appellate Procedure Rule 11, said

petition denied by *per curiam* order. [Petition App. 29.]

It is undisputed that Petitioner failed to follow the requirement of Tennessee Rules of Civil Procedure Rule 56 in the response that was filed with the trial court. Petitioner states in his Petition to this Honorable Court that "Plaintiff **readily admits** that his response to Defendants' Statement of Undisputed Material Facts did not comply with the technical pleadings requirements of [Tennessee Rules of Civil Procedure] Rule 56.03." (Emphasis added) [Petition p. 13] Even Petitioner's Issue Presented for Review in the Petition for Writ of Certiorari recognizes the failure of Petitioner to provide a proper response to the summary judgment motion at the trial court level:

> Whether the Court of Appeals' finding that Plaintiff **failed to properly comply with the technical pleading requirements** of Tenn. R. Civ. P. 56.03, and the court's subsequent refusal to consider evidence **submitted by Plaintiff but not properly included in his response** to Defendants' Statement of Undisputed Material Facts, served to violate Plaintiff's due process rights under the circumstances of this case. (Emphasis added)

The Petitioner also states in his Petition to this Court: "Furthermore, Plaintiff fully acknowledges that **when the non-moving party fails to comply with Rule 56.03**, the trial court has no duty to

independently search the record to determine if a genuine issue of material fact exists." (Emphasis added) [Petition p. 16] Petitioner then argues that the Middle Section of the Tennessee Court of Appeals was "fundamentally unfair" [Petition p. 13] because it determined that his failure to comply with the requirements of Rule 56.03 mandated affirmance of the trial court's summary dismissal.[4]

Petitioner now asks this Honorable Court to accept this appeal of the decision issued by the Tennessee Court of Appeals under the pretext that his constitutionally guaranteed due process rights were violated by the lower courts' decisions. Respondents McKellar submit that where a party fails to properly avail himself of the rights and remedies afforded to him through the Court Rules and precedent governing the litigation, he cannot then cloak an adverse decision under a guise of deprivation of fundamental fairness and constitutional due process protection. Respondents McKellar submit that Petitioner's request for certiorari review should be denied in its entirety.

## Case Facts

As noted in the statement of undisputed material facts filed by the Respondents in the trial court in

[4] In the discussion of the case status, Petitioner ignores the fact that the Tennessee Supreme Court did not believe that the case warranted appellate review.

support of the motion for summary judgment and as highlighted in Petitioner's request for certiorari review by this Court, the following facts were alleged by the Respondents McKellar to be undisputed.

1. In late fall 2003, James Edward Williams and his wife, Gladys Williams, agreed to obtain a divorce. Complaint ¶11.

2. In December 2003, Norman McKellar filed a divorce complaint on behalf of Gladys Williams. Complaint ¶11.

3. The complaint alleged that, at the time it was filed, Mr. and Mrs. Williams had joint custody of their child. Complaint, ¶11.

4. On April 7, 2004, Norman McKellar returned a telephone call to his client, Gladys Williams. Norman McKellar Affidavit, ¶4.

5. Ms. Williams told Norman McKellar she had information that her husband James Williams was going to pick up their two-year-old son from his daycare, La Petite Academy, and take him to Florida for two weeks. Norman McKellar Affidavit, ¶4.

6. As an advocate for his client, Gladys Williams, in the ongoing divorce case, Norman McKellar called Barbara Cochran at La Petite Academy and informed her that his client, Gladys Williams, did not want her husband to take the child from the daycare center because he had indicated he planned to take the child to Florida for two weeks.

Ms. Cochran asked if there was a court order or parenting plan prohibiting Mr. Williams from taking his son. Mr. McKellar told her that there was no such order or plan. He told her a proposed parenting plan had been submitted to the court but had not been signed by the judge and was not in effect. Ms. Cochran asked Mr. McKellar to fax the proposed parenting plan to her attention. Norman McKellar Affidavit, ¶6.

7. On April 7, 2004, Mr. McKellar faxed the proposed parenting plan to Ms. Cochran along with a letter. Norman McKellar Affidavit ¶7. His fax machine generated a fax confirmation indicating the fax was received. Norman McKellar Affidavit ¶8. The letter dated April 7, 2004, said:

> As I mentioned to you during our telephone conference today, I represent Gladys Williams in her pending divorce against Jim Williams. I have attached a copy of our Proposed Temporary Parenting Plan for your review.
>
> My client does not consent to allowing her son, Tommy, to go to Florida with Mr. Williams. We hope and expect that you will honor my client's wishes.
>
> Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Norman McKellar Affidavit, ¶12, Exhibit 1.

The parenting plan enclosed in the letter was clearly titled, in bold face type, "**THE PLAINTIFF'S PROPOSED TEMPORARY PARENTING PLAN.**" It was identified as a temporary plan in the text of the letter, and it was obviously not signed by a judge. Norman McKellar Affidavit, ¶12, Exhibit 1.

8. The letter dated April 7, 2004, the proposed parenting plan enclosed in the letter, the fax confirmation indicating delivery of the fax to La Petite, and the fax cover sheet and fax transmittal confirmation indicating delivery of the fax to John Harber, are attached to Mr. McKellar's affidavit as collective Exhibit 1. Norman McKellar Affidavit, ¶12.

9. At no time did Norman McKellar tell Ms. Cochran or anyone else at La Petite that there was a restraining order prohibiting Mr. Williams from removing his son from the daycare center. What he told Ms. Cochran was that Gladys Williams had information that Mr. Williams intended to take the child to Florida for a period of two weeks, that Gladys Williams did not want him to do so, and that they wanted her cooperation in prohibiting the child from being taken from the daycare by Mr. Williams. Norman McKellar Affidavit, ¶10.

10. Mr. McKellar did not conceal his communication with La Petite. He called Mr.

Williams' attorney, John Harber, on April 7, 2004, to advise him of the communication with La Petite, and he sent Mr. Harber a copy of the April 7, 2004 letter to La Petite by fax. Norman McKellar Affidavit ¶11.

11. On the same day the letter was sent, Mr. Williams arrived at La Petite to take his son. The director of La Petite told him apologetically that he could not remove his son from the premises or be alone with him. Complaint, ¶14.

12. Mr. Wiiliams alleges that he thought he was being accused of some vile behavior against his son. He claims to have immediately experienced chest and back pain, shortness of breath, chill sensations, and heart palpations. Complaint, ¶14.

13. Mr. Williams asked the La Petite director if there was a court order or injunction. She told him there was and showed him the documents faxed by Mr. McKellar. Complaint, ¶15.

14. Mr. Williams immediately recognized that what the director of La Petite thought was a court order was a proposed parenting plan that had not been signed by the judge. Complaint ¶16.

15. The director of La Petite again called Mr. McKellar. Mr. McKellar continued to vigorously object to the removal of the child from La Petite and said the parenting plan would be effective within the week. The

director then allowed Mr. Williams to leave the La Petite premises with his son. Complaint, ¶17.

16. Mr. Williams alleges that he continued to suffer symptoms indicative of a heart attack. He returned his son to La Petite after a short visit. The La Petite personnel were concerned about Mr. Williams and called an ambulance to go to his home. Complaint, ¶18.

17. Mr. Williams alleges that Mr. McKellar knew Mr. Williams had a heart condition. Complaint, ¶20.

18. At the end of May 2004, Mr. McKellar left the office of Bunstine, Watson & McElroy to open a new office, and thereafter Nicole Price and Brent Watson of Bunstine, Watson & McElroy assumed handling of the file. Norman McKellar Affidavit ¶3.

[Petition, p. 6-9.]

The Petitioner quotes from the affidavit of Ms. Barbara Cochran, the director of La Petite Academy, said affidavit filed as part of his response to the pending motion for summary judgment and statement of undisputed material facts. [Petition p. 9-10.] This affidavit, however, is not inconsistent with the affidavit testimony of Respondent McKellar. Her affidavit confirms that Respondent McKellar contacted her, in his representative capacity as Ms. Williams' attorney. The date of this initial contact is not defined specifically by Ms. Cochran, but is referenced as

"Approximately two weeks prior to April 19, 2004." Respondents McKellar submit that the Court can take judicial notice that "two weeks," or fourteen days, prior to April 19, 2004, is April 5, 2004. The date of the telephone call, the date on the letter and the date of communication to Ms. Cochran from Attorney McKellar is April 7, 2004, a date that is, indeed, "approximately two weeks prior to April 19, 2004." Respondent McKellar submits that the operative date of the statute of limitations would be April 7, 2004, the date that the communications were made; not the April 19, 2004 date referenced by Plaintiff and Ms. Cochran in their affidavits.

Upon these facts, the Petitioner sought recovery from these Respondent attorneys on numerous theories, identified in the Petition before this Court as intentional infliction of emotional distress [Petition p. 16], fraud [Petition p. 18], defamation and/or defamation by implication [Petition p. 19], invasion of privacy by placing him in a false light [Petition p. 20] and negligence, gross negligence and negligent infliction of emotional distress. [Petition p. 21] Respondents McKellar filed a motion to dismiss or for summary judgment asserting that the statute of limitations had expired on each claim and, therefore, there was no viable claim before the Court. The trial court granted the summary judgment to the Defendant attorneys [Petition App. 27-28] and the Tennessee Court of Appeals affirmed the decision. [Petition App. 1] The intermediate appellate court specifically stated that it did not consider the arguments on the

statutes of limitations for each of the claims asserted because the procedural decision that there was insufficient response to the motion rendered the substantive arguments moot. The Tennessee Supreme Court denied appellate review and the matter is now before this Honorable Court by way of a Petition for Writ of Certiorari.

## REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Respondents respectfully request that this Honorable Court deny the Petitioner's request for a Writ of Certiorari to the Tennessee Court of Appeals inasmuch as this Court does not have jurisdiction to review purely state law judgments where there is no federal question. Failure of the Petitioner to properly avail himself of the Tennessee Rules of Civil Procedure does not equate to a constitutional violation for which this Court should grant certiorari. Further, the Tennessee Court of Appeals affirmation of the trial court's grant of summary judgment to the Respondents was proper under the Tennessee Rules of Civil Procedure and precedent applicable to Tennessee summary judgment determination. There simply is no federal issue presented to this Court and denial of Petitioner's request is appropriate.

**1. The Petitioner's Petition for a Writ of Certiorari to the Tennessee Court of Appeals fails to present an issue over which this Court has jurisdiction and further fails to satisfy any criterion for this Court's review.**

As noted in the statement regarding jurisdiction, herein above, this Court does not have appellate jurisdiction over decisions where the state appellate court decided a matter specifically related to state law claims, there being no federal question for this Court to consider. As will be shown herein, the Petitioner's glaze of constitutional language over the facts and decision below is insufficient to produce a matter appropriate for this Honorable Court to consider on certiorari.

Appeal to the United States Supreme Court is by permission through certiorari only; there is no right to a United States Supreme Court appeal. Because Petitioner's appeal is not "of right," certain criteria must be met to sustain the requested appeal. Specifically, Supreme Court Rule 10 states that certiorari is available for:

> b) a decision of state court of last resort where it has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a U.S. Court of Appeals; or c) **decision from state court of appeals that has decided an important question of federal law that has not been, but should be, settled by the Supreme Court** or which has decided an important federal question in a way that conflicts with relevant decisions of

> the United States Supreme Court. (Emphasis added)

In the Petitioner's case, there is no decision from the court of last resort so as to satisfy Rule 10(b). Indeed, the Tennessee Supreme Court declined to take Petitioner's requested appeal by *per curiam* order. Therefore, Supreme Court Rule 10(c) is the only basis upon which certiorari might be obtained from this Court; however, even that subsection is inapplicable to the instant petition.

The Tennessee Court of Appeals decided Petitioner's case based on Tennessee procedural law regarding the requirements that must be met for requesting and responding to a summary judgment motion. The intermediate appellate court determined that the Petitioner failed to comply with the mandatory requirements of Tennessee Rules of Civil Procedure and, therefore, that the Respondents' motion for summary judgment was properly granted by the trial court. The issues involved in this case relate to the application of state rules of court to a party's state law tort claims asserting a variety of wrongs and associated damages. There is no question of federal law and no question of disparate conflicting decisions between courts that would require this Court's supervisory attention.

In his address before the American Bar Association on September 7, 1949, Chief Justice Vinson stated,[5]

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgments." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities

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[5] Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi; see also *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452-54 (1959) (Frankfurter, J., dissenting). Address of Chief Justice Hughes before the American Law Institute, XI Proc. Am. Law Inst. 313 (1934); Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn. 541 (1958).

> placed upon the Court. **To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.** (Emphasis added)

While Petitioner tries to make this appeal sound in terms of violation of his constitutional rights to due process, this simply is not supported by the facts. There is no state actor – the Respondents are individual licensed attorneys at law, and their associated law firm, who were representing the Petitioner's ex-wife in a contested divorce and custody battle. There is no federal question – the issues relate to asserted tort claims involving Petitioner's attempt to retrieve his son from the day care. There is no constitutional due process issue – the trial court and the Court of Appeals both applied Tennessee law regarding the method of moving for and responding to summary judgment pursuant to Tennessee Rules of Civil Procedure.

Respondents McKellar submit that Petitioner's request for certiorari review is not properly subject to the jurisdiction of this Court and it is not supported by any criteria set out in the Supreme Court rules. The Petition for a Writ of Certiorari to the Tennessee Court of Appeals should be denied.

**2. The Petitioner's Petition for a Writ of Certiorari to the Tennessee Court of Appeals fails to demonstrate any constitutional violation that would mandate this Court's appellate review.**

It is well settled in Tennessee that a dismissal as a matter of law should be granted when the movant demonstrates that no genuine issue of material fact exists. See *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Tennessee Rules of Civil Procedure 56.03 provides, in pertinent part:

> Specifying Material Facts
>
> In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.
>
> Any party opposing the motion for summary judgment must, **not later than five days before the hearing, serve and file a response to each fact** set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating

> that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment. . . . (Emphasis added)

Tenn. R. Civ. P. 56.03.

The parties' statements of material facts submitted on a motion for summary judgment are "intended to alert the court to precisely what factual questions are in dispute and point the court to specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own." *Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. Ct. App. 2001) (perm. app. denied) (quoting with approval, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 923 (7th Cir.1994)). Although the trial court [and, hence, the Court of Appeals] may, at its discretion, waive the requirements of the rule where appropriate, the court may also refuse to consider the factual contentions of a non-complying party even where such facts are ascertainable by the record. *Id.*

The material facts set forth in the statement of the moving party may be deemed admitted in the absence of a statement controverting them by the opposing party. *Holland v. Memphis*, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003) (perm. app. denied). Accordingly, **a party's failure to file a proper response**

**in opposition to a motion for summary judgment generally will prove fatal in the trial court and upon appeal.** *Id.* (Emphasis added by writer)

In *Byrd v. Hall,* 847 S.W.2d 208 (Tenn. 1993), the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

847 S.W.2d at 210-11 (citations omitted) (emphasis in original). Once a party seeking summary judgment demonstrates that its motion complies with the requirements of Tennessee Rules of Civil Procedure 56, the burden of going forward shifts to the nonmoving party to demonstrate either that material factual disputes exist or that the moving party is otherwise not entitled to a judgment as a matter of law. *Nelson v. Martin,* 958 S.W.2d 643, 647 (Tenn. 1997).

Tennessee law is clear that mere conclusory allegations will not suffice to create a material factual dispute. *Psillas v. Home Depot, U.S.A., Inc.,* 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001). This is consistent with precedent from this Honorable Court.

> "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

*Scott v. Harris*, 2007 U.S. LEXIS 4748, 14-15 (U.S. 2007).

The standard for summary judgment set out in the Tennessee Rules of Civil Procedure mandates that a non-moving party "must" serve and file, **at least five days prior to the summary judgment hearing,** a response with facts and citation to the record to rebut the statement of undisputed facts filed by the moving party. Not only did Petitioner's response to the motion for summary judgment and the statement of undisputed material facts fail to comply with the required format, it is undisputed that the response was not filed until the day before the hearing, well outside the "five days before the hearing" requirement of the rule. Petitioner's refusal to follow the mandatory requirements of the Tennessee Rule concerning the summary judgment motion and response supports the Court of Appeals' decision affirming summary

judgment, supports the Tennessee Supreme Court's denial of discretionary appellate review, and mandates this Court's denial of Petitioner's request for a Writ of Certiorari to the Court of Appeals.

This Honorable Court should not take its time to provide a third appellate review of this state law case in which the Petitioner has not fully taken the opportunity to protect himself from summary judgment dismissal by properly following the applicable rules. Tennessee Rules of Civil Procedure 56.03 is specific in its requirements. It lays out a process by which the moving party files its motion and the non-moving party responds. This procedure presents the reviewing courts, both trial and appellate, with the information necessary to determine if summary judgment is appropriate. As noted above, failure to follow the Rule is "generally fatal."

Petitioner in this case failed to follow the requirements of Rule 56.03 on several counts, and as a result suffered dismissal of his claims. Further, Petitioner admits his failure to properly follow the Rules with respect to his response to the summary judgment motion. The United States Supreme Court is not in the business of reviewing factual issues, especially where the party seeking review did not do all in his own power to state his case before the trial court. The superimposition of constitutional language does not change the character of the subject Petition.

Having failed to comply with state law requirements, the Petitioner suffered the consequences. No constitutional violation occurred, and no United States Supreme Court appellate review is necessitated.

### 3. The decisions cited in Petitioner's Petition for a Writ of Certiorari to the Tennessee Court of Appeals fail to support the requested relief.

The Petitioner argues that fundamental fairness described and mandated in numerous Supreme Court decisions should be applied to the case at bar so as to revitalize his case, implicitly asserting that he was denied fundamental fairness by the dismissal of his lawsuit.

> It is also well-established that the rules of civil procedure must be applied in a manner that comports with the notion of fundamental fairness embedded in the due process clauses. See *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 610 (1988) (a motion for default judgment could not be granted without meaningful notice to the defendant, even if the defendant failed to establish the probability of a meritorious defense to the claim, as required under Texas state law); *Vythoulas v. Vanderbilt University Hosp.*, 693 S.W.2d 350, 356 (Tenn. App. 1985) (trial court's discretion in applying rules of civil procedure, such as Rule 26

governing pre-trial discovery, is bound by notions of fundamental fairness).

[Petition p. 12-13]

At the outset, it is clear that the cases that Petitioner cites for the application of "fundamental fairness" do not apply to the scenario applicable in the case at issue. The *Peralta v. Heights Medical Center* decision clearly relates to notice required to be given prior to entry of a default judgment. Obviously, constitutional due process considerations are rampant in a scenario where a default judgment is entered against an entity that has no notice of the litigation. This concern, however, is totally inapposite to the instant Petition. The Petitioner had notice of the summary judgment motion. The Petitioner had notice of the statement of undisputed facts for which response was required. The Petitioner knew, or should have known, of the requirements imposed on litigations by Tennessee Rules of Civil Procedure 56.03, specifically the requirement to file a timely response addressing the individual facts asserted to be undisputed.

In like manner, the decision in *Vythoulas v. Vanderbilt University Hosp.* referenced by the Petitioner in support of his assertion of "fundamental fairness" relates to the discretion necessary with respect to an order concerning Tennessee Rules of Civil Procedure Rule 26 discovery. This decision, too, is inapposite. The scope of discovery and the type of compelled response thereto is certainly subject to fundamental fairness so

as to pass constitutional muster. This type order is ripe with fairness issues because Rule 26 discovery orders compel the party to produce information to which objection has been raised; it encompasses concepts of invasion of privacy and unwarranted taking of property through compelled production. Such is not the case in the Petition before this Court.

In the case at bar, the Petitioner admits that he did not take the required steps to support his claim in the trial court. He admits that he did not respond to the statement of undisputed facts as directed in the Tennessee Rules of Civil Procedure. He admits that he did not provide timely, proper evidence to rebut that which was presented by the Respondents. Therefore, Respondents McKellar submit that he cannot now claim to have been denied constitutional due process when he failed to avail himself of the opportunities afforded to him to present his claim as cogently as possible.

## CONCLUSION

For the foregoing reasons, the Respondents McKellar request that this Honorable Court deny the Petitioner's request for a Writ of Certiorari to the Tennessee Court of Appeals. The Petition does not present an issue of the quality and character that would require consideration by this Honorable Court. Petitioner is understandably upset because his claims have been defeated in both the trial court and the Tennessee Court of

Appeals. However, the individualized displeasure of one party, who failed to protect his own interests when addressing the Respondents' summary judgment motion, is not the broad-based policy type decision that merits review by this Honorable Court.

In short, the answer to Petitioner's "question presented" is "No." The trial court did not err in granting summary judgment to the Respondents. The Tennessee Court of Appeals did not err in its affirmance of summary judgment and in its finding that the Petitioner failed to comply with Tennessee Rules of Civil Procedure 56, even the Petitioner agrees that he did not so comply. There is no evidence of any constitutional violation of Petitioner's due process rights.

Petitioner's request for a Writ of Certiorari to the Tennessee Court of Appeals should be denied.

Respectfully submitted this 17th day of October 2007.

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